

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 94 of 1998

TO

CRIMINAL REVISION APPLICATION No 98 of 1998

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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BHAVESH BHARATBHAI MEHTA & ORS

Versus

STATE OF GUJARAT

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Appearance: IN ALL THE MATTERS.

MR PK JANI for Petitioners

MR SR DIVETIA APP for Respondent No. 1

MR MEHUL SHARAD SHAH for Respondent No. 2

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CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 12/08/98

ORAL JUDGEMENT

Heard learned advocates Mr. Jani for the petitioners, Mr. Mehul Sharad Shah for the respondent no.2 and the learned APP Mr. Divetia for the respondent no.1.

A common question of law arises in all these applications and, therefore, these applications are disposed of by this common judgment with the consent of the learned advocates. The question that has been posed for consideration by the court is whether in a case where the person committing an offence under section 138 of the Negotiable Instruments Act, 1881, (hereinafter referred to as "the Act") is a Company, the notice, envisaged under section 138 of the Act is required to be given to every person, who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company as well as the company.

The short facts giving rise to these applications are that the respondent no.2 is a creditor of the partnership Firm named and styled as M/s Paint Chem, having its business at Mumbai. One Shri Bharatbhai Mehta, who held out himself to be the partner in the said M/s Paint Chem (hereinafter referred to as the "accused-firm") had entered into certain business transactions with the respondent no.2 Firm. In due discharge of its liability, the accused-firm issued five cheques for various amounts, which on presentation to the bank, were returned unpaid by the bank on which they were drawn. The cheques were drawn by the Firm and were signed by Shri B.B.Mehta a partner in the Firm. Believing that Shri Bharatbhai Mehta who had been holding out himself to be a partner in the accused firm was Shri B.B.Mehta, notice as envisaged under section 138 of the Act was given to the Firm as well as Shri Bharatbhai Mehta. The notice given to the firm was received by Shri B.B.Mehta and was replied to by Shri B.B.Mehta. In spite of the notice, it is alleged, the accused-firm failed to make payment of the cheque amounts, giving rise to five complaints against the accused firm and Shri Bharatbhai Mehta. Pursuant to the said complaints, five cases being Criminal Case Nos. 4778/94, 4779/94, 4776/94, 4777/94 and 4775/94 were instituted against the accused-firm and Shri Bharatbhai Mehta. Pending the trial, on 16th December, 1995, Shri Bharatbhai Mehta moved an application for discharge claiming that he was not a partner in the accused firm and in support of his claim,

produced a partnership deed. It was for the first time made known to the complainant that the present petitioners were the partners in the accused firm. The application for discharge made by Shri Bharatbhai was rejected on 30th July, 1996. The complainant, having been made aware of the true position, on 26th June, 1996, moved an application Ex.40 to arraign the present petitioners as accused persons in the above referred Criminal Cases. By an order dated 30th July, 1996, the said application was allowed. Feeling [ aggrieved, the petitioners have preferred the above applications under section 397 Cr.P.C.

Mr. Jani has contended that neither of the petitioners was given notice as envisaged under section 138 of the Act and in absence of any notice given to the petitioners, the complaint against them was not maintainable and the order arraigning them as accused persons is, therefore, illegal and requires to be set aside. He has submitted that the underlying object in enacting clause (b) of the proviso to section 138 of the Act is to give an opportunity to the accused to make payment of the cheque amount and to absolve him from criminal liability. It is, therefore, imperative that each of the persons who is arraigned as accused for offence punishable under section 138 of the Act be given notice as envisaged under section 138 of the Act. He has further submitted that by giving notice to the Company no knowledge can be imputed to everyone who may be in charge of and be responsible to the Company for the conduct of the business of the Company. Further, if any person to whom no notice is given, is arraigned as accused, the underlying object of section 138 of the Act would be frustrated and therefore also it is imperative that everyone of them is given due notice.

Mr. Shah has contested these applications. He has submitted that section 138 of the Act does not require that if the person committing offence under section 138 of the Act is a Company, every person who is in charge of and is responsible to the Company for the conduct of the business of the Company shall be given notice. He has submitted that section 138 of the Act requires that the notice be given to the drawer of the cheque. In support of his contention, he has relied upon the judgment of the Andhra Pradesh High Court in the matter of SURAJ THEATRE & ANR VS. SMT. KAKARIA BHORATHE & ANR ( 1998, CR.L.J. 43) and also upon a judgment of the Madras High Court in the matter of OSWAL ISPATUDYOG & ORS VS M/S SALEM STEEL SUPPLIERS (1992 {supple} MWN {cr} Mad. 1991 (2) MWN {cr} 117 (Mad)).

If a cheque drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person from out of that account is returned by the bank unpaid, for the reasons stated in section 138 of the Act, that person is deemed to have committed an offence punishable with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with both. Clause (b) of proviso to section 138 provides that nothing in that section shall apply unless the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque. Section 141 of the Act provides, inter alia, that if the person committing an offence under section 138 is a Company, every person who, at the time the offence was committed, was in charge of and was responsible to the Company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Explanation thereof provides that "for the purposes of this section, (a) "company" means any body corporate and includes a firm or other association of individuals; and (b) "director" in relation to a firm means a partner in the firm." Hence, for the purpose of section 141 of the Act, a partnership firm is a company and the partner thereof is a director. It is, therefore, evident that if the person committing an offence under section 138 of the Act is a partnership firm, every partner thereof who is in charge of and is responsible to the firm for the conduct of the business of the firm as well as the firm shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. In my view, the Legislative intention is clear. The Legislaure had no intention to make it obligatory to give individual notice to every person in charge of or persons who may be responsible to the company for the conduct of its business. A person in charge of and responsible to the Company for the conduct of its business is presumed to have knowledge about the day-to-day business of the Company. He is supposed to be well-informed about the day-to-day transactions of the Company and is not permitted to plead ignorance in respect of such matters. The Legislature, therefore, in its wisdom has made it obligatory upon the complainant to make demand for payment of the cheque amount by giving notice in writing to the drawer of the cheque alone and no person other than the drawer of the cheque is required to be given notice under section 138 of the Act.

In the matter of Surya Theatres (Supra), the very question had come up for consideration before the Andhra Pradesh High Court, and considering the provisions contained in sections 138 and 141 of the Act,, following the judgments of the Delhi High court and the Punjab & Haryana High Court, the court held that, "section 141 of

the Act does not prescribe that notice need be given to the persons who are in charge of and responsible for the conduct of the business with regard to the dishonour of the cheque issued on behalf of the Company before filing a complaint. Such persons are necessarily fully aware and must have knowledge of the said aspect and hence deemed to be guilty of the said offence and liable to be proceeded against and punished accordingly." The court, therefore, held that no individual notice was required to be given to the partner or person in charge of and responsible for the conduct of the business of the company or a firm. A similar view has been expressed by the High Court of Madras in the matter of Oswal Ispatudyog & Ors.- (supra). I am in complete agreement with the view expressed by the Andhra Pradesh High Court and the Madras High Court.

The petitioners in the present applications are admittedly the partners in the accused firm. The accused firm had drawn the cheques which were dishonoured by the bank. The accused firm for the purposes of section 138 of the Act, is a company and the petitioners are the directors thereof. The offence is alleged to have been committed by the accused firm. The petitioners are, therefore, deemed to be guilty of the offence and are liable to be proceeded against and punished accordingly. As discussed hereinabove, neither of the petitioners was required to be given individual notice envisaged under section 138 of the Act. The action of the trial court in arraigning the petitioners as accused persons in the above referred criminal cases is, therefore, legal and is in consonance with the provisions contained in sections 138 and 141 of the Act. Same, therefore, does not call for interference by this court.

In view of the above discussion, the applications are dismissed. Rule Nisi issued in each of the applications is discharged. Interim orders stand vacated. The parties shall bear their own costs.

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JOSHI